

Nirma Industries Ltd.

Vs.

Director General of Investigation & Registration

(CJI J. S. Verma, S. P. Kurdukar JJ)

06.05.1997

JUDGEMENT

S.P.KURDUKAR, J.

1. This appeal under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 (for short 'the Act') is filed by the appellant challenging the legality and correctness of the judgment and order dated January 4, 1996 passed by the Monopolies and Restrictive Trade Practices Commission, New Delhi (for short 'the Commission'). The appellant has suffered an order of 'cease and desist' under Section 36-D of the Act for having indulged in unfair trade practices under Section 36A(3)(a) of the Act.

2. Briefly stated the facts of the case are as under:-

The appellant a public limited company (for short 'the company') having its registered office at Ahmedabad, is engaged in manufacture and sale of Nirma washing powder, Nirma detergent cakes and Nirma bath soaps. The company has been manufacturing these products since early seventies and its products are marketed and sold all over the country. It is the claim of the appellant that having established a good market for sale of its various products and having been captured the confidence of the consumers, thought of offering a scheme as an incentive to the consumers for its products. The appellant, therefore, on April 25, 1991, floated a scheme of awarding and distributing of prizes through a lottery. According to the scheme, the appellant placed a coupon bearing a number in each one kg. pack of detergent/washing powder. The said scheme was valid till July 31, 1991 and the draw of lots was to be held on August 30, 1991. The coupon kept in the one kg. bag of detergent mentioned that prizes worth Rs. 71 lacs were to be distributed which included Contessa Car, Maruti 800 Car, BPL TV set, golden chain, Titan watch, Steel jug, Ladies purse, Steel bawl set and cash.

3. On July 24, 1991, a complaint was received by the D.G. (I & R) from Azad Singh, New Delhi, alleging, inter alia, that the company while floating a scheme in question did not inform the customer as to in which newspaper the result would be published; the company had increased the price of the detergent along with prize scheme; the said scheme is harming the interest of the other companies in this competition and the condition of the coupon is so bad that while opening the bag, it would get torn and the winner of the prize will have to face difficulty in getting the prize which would help the company in evading the responsibility to give the prize. Azad Singh, therefore, prayed that action be taken against the company and "save the poor people being robbed." The D.G. very promptly responded to the complaint of Azad Singh and filed an application on July 26, 1991 before the Commission for investigation and registration of the complaint under Section 36B [c] of

the Act. The D.G. requested the Commission to hold an inquiry into the unfair trade practices under Section 36D(I) of the Act and pass an order of cease and desist against the company. It was alleged in the complaint that the scheme in question floated by the Company was with a view to promote the sale of its detergent powder; that it lured the customers to purchase more and more Nirma detergent powder under the temptation of getting the prizes; that this trade practice of offering prizes would lead to excessive purchases and consumption by the customers in the expectation of getting prizes; that such avoidable and the excessive purchases were real loss to the consumers and that it had deleterious impact on competition inasmuch as extraneous consideration other than quality and the price of the product tend to determine the consumer preference; that there are several detergent manufacturers in India; that the impugned scheme of the respondent affected, distorted and restricted competition among the various manufacturers of detergent powder and that the conduct of lottery or game of chance for the purpose of promoting the sale, use or supply of detergent powder by the appellant amounted to an unfair trade practice within the meaning of Section 36A(3) (a) and (b) of the Act. It was then alleged by the D.G. in his complaint that company had increased the price of its detergent powder just prior to the launching of the scheme with an intention to recover the value of the prizes fully or partly from the consumers by raising the prices of its products. The company, therefore, had indulged in unfair trade practice under Section 36A(3)(a) and (b) of the Act. The D.G, therefore, recommended that the Commission would inquire into the complaint and pass cease and desist order against the company.

4. The Commission on perusal of the application the D.G. and examining the documents annexed thereto issued notice inquiry to the company.

5. On receipt of the said notice, the company filed its detailed reply denying the allegations contained in the complaint. The Company, however, accepted that it had floated the scheme in question with a view to give prizes to the customers. The company denied that it had indulged in any unfair trade practice for the purpose of promoting the sale or it had caused loss and injury to the customers or eliminated or restricted competition. That the scheme had come to an end on July 31, 1991, and therefore, the complaint filed by the D.G. has become infructuous. That the draw was held and the prizes were declared and distributed according to the scheme. That there is no cogent and sufficient material to hold that the scheme in question had infringed either the provisions of Section 36A(3)(a) or Section 36A(3)(b) of the Act. That there is no averment in the complaint which would prima facie show that company had indulged in unfair trade practice being prejudicial to the public interest or the interest of any consumer or consumers generally. That the impugned prize scheme was approved and authorised by the District magistrate, Ahmedabad under the Bombay Lotteries (Control and Tax) and Prize Competition(Tax)Act, 1958 and the rules framed thereunder. That the increase in the price of its product was not with an intention to cover. the prize money either fully or partly. On the contrary, the price were increased on July 26, 1990, November 19, 1990 and April 2, 1991 because of increase in the prices of raw material and other costs. That the scheme floated did not lure the customers to purchase more and more washing power under the temptation of getting prizes. That the demand and supply of such products are governed by several factors in the market and the consumers were never influenced by mere introduction of the impugned scheme. That no public interest had been prejudiced by the impugned scheme. The company, therefore, prayed that the complaint and the application being devoid of any merit and the same be dismissed.

6. The Commission on the basis of the above pleadings formulated four issues for its consideration and heard the Advocates for the parties. The Commission vide its impugned order found that the company has not committed the breach of Section 36A(3) (b) of the Act and the charge in that

behalf is unsustainable. The Commission, however, found that the charge against the company under Section 36A(3) (a) of the Act is proved and accordingly directed the company not to repeat the same in future. It is this order of the Commission dated January 4, 1996 which is subject matter of challenge in this appeal.

7. In this appeal, we are called upon to decide as to whether the company had indulged in any unfair trade practice as provided under Section 36A of the Act as it stood between May 21, 1984 and September 24, 1991. Section 2U defines trade practices as under:-

"2U-Trade practice mean any practice relating to carrying on of any trade, and includes-

i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of trader,

(ii) a single or isolated action of any person in relation to any trade."

8. The Act came to be amended by Act No.30 of 1984 called the Monopolies and Restrictive Trade Practices (Amendment) Act, 1984, Section 36A was brought on Statute in Chapter V part B called "Unfair Trade Practices." Section 36A defines Unfair Trade Practices and the relevant provisions are as under:-

36A-Definition of Unfair Trade Practice:-

"In this part, unless the context otherwise requires, "unfair trade practice" means a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby cause loss or adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or by service, whether by eliminating or restricting competition or otherwise, namely.-1. xxxx xxxx xxxx

2. xxxx xxxx xxxx

3. (a) Permits-the offering of gifts, prizes or other times with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole, (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.

4. xxxx xxxx xxxx

5. xxxx xxxx xxxx

Section 36C provides investigation by Director General before an issue of process in certain cases. In the present case, the Director General on receipt of the complaint on July 24, 1991 from one Shri Azad Singh, perused the same and immediately on July 26, 1991 submitted his application to the Commission for making inquiry and for suitable action under Section 36D of the Act.

9. On perusal of the scheme of Section 36A to 36E, it is clear that whenever a complaint is received

by the D.G. alleging unfair trade practice having been committed by the company, the D.G. under Section 36C is obliged to make a preliminary investigation including issuance of notice of the complainant for the purpose of investigation and on being satisfied that the complaint requires to be inquired into, submit his application to the Commission for inquiry under Section 36D of the Act. In the present case, it is common premise that the presence of Azad Singh could not be secured and the only material before D.G. at the time of making an application to the Commission was the complaint dated July, 24, 1991. The company on receipt of notice of inquiry granted from the Commission filed its detailed reply along with the certificate, granted by the District Magistrate, Ahmedabad (Lottery) granting permission to the scheme.

10. As indicated earlier, the Commission recorded a finding that no charge under Section 36A (3) (b) of the Act was proved against the company. No appeal against that part of the order of the Commission was filed in this Court. The said finding and order thereof passed by the Commission is final and is not the subject matter of challenge in this appeal. What survives for reconsideration in this appeal is as to whether on the material placed before the Commission, the order passed against the company under Section 36A (3) (a) is sustainable.

11. Mr. Dushyant A. Dave, Learned Senior Advocate appearing in support of this appeal urged that the order of the Commission holding that the company had indulged in unfair trade practice under Section 36A (3) (a) is unsustainable because there was no material except the complaint/application of D.G. before the Commission to hold the charge proved. He urged that the Commission erroneously assumed that the offering of prizes was with an intention not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole. While elaborating this submission, he urged that the increase in the prices of detergent on April 2, 1991 was a bonafide exercise on the part of the company and the same was not done with a view to wholly or partially cover the amount of prizes to the consumers under the Scheme. The offering of such prizes was merely an incentive to the consumers for their "brand and loyalty". Learned Counsel urged that in order to prove the charge under Section 36A(3)(a) of the Act, there has to be a cogent evidence before the Commission to hold the said charge proved. In the present case, he urged that except a complaint of Azad Singh received by the D.G. on July 24, 1991, there was no other material either before the D.G. or before the Commission to substantiate the said charge. The preliminary inquiry that was alleged to have been conducted by the D.G. was wholly perfunctory. The complaint filed by D.G. on July 26, 1991 was nothing but an ipse dixit based on the complaint dated April

24, 1991 filed by Azad Singh whose presence despite best efforts could not be secured either at the time of preliminary inquiry or before the Commission. He then urged that Section 36A does not equate specified practices in sub Section (1) to sub Section (5) as unfair trade practices but merely enumerates them as trade practices. It is only when such trade practices result in causing loss or injury to consumers of such goods or services by eliminating or restricting competition or even otherwise when they become "unfair trade practices". The legislature did not characterise the specified trade practice as unfair trade practices. Therefore, on a plain construction of Section 36A, It is necessary that every ingredient must be satisfied and particularly because of the use of word and after the words "the following practices" as also the words "thereby cause loss or injury" before the words "to the consumers of such good or services." To substantiate the above argument, counsel drew our attention to the Sachar Committee report which recommended to specify certain unfair trade practices and prohibit them altogether as indicate in the Bill but, however, the legislature by amendment Act No. 30 of 1984 redefined Section 33 but did not choose to redefine Section 36A despite the recommendation of the Sachar Committee. He, therefore, urged that in the absence of

proof of trade practices resulting in causing loss or injury to consumers of such goods or services by eliminating or restricting competition or even otherwise, they would not become unfair trade practices. The Commission erroneously assumed that there was per se unfair trade practice in the scheme which view is unsustainable.

12. Mr. Ganguly, Learned Senior Advocate appearing for the respondent/Commission seriously countenanced the aforesaid contention raised on behalf of the appellant and urged that the plain reading of Section 36A which defines the expression unfair trade practices to mean a trade practice which, for the purpose of promoting the sale, use or supply of any goods, adopts (a) one or more of the practices enumerated therein; and (b) thereby causes loss or injury to consumers of such goods by eliminating or restricting competition or otherwise. In order to constitute an unfair trade practice an unfair trade practice under Section 36A, it is necessary to establish that the trade practice concerned is one of several kinds of trade practices mentioned in sub section (1) to (5) thereof and once it is established that the trade practice complained of falls in one or more of the trade practices mentioned in sub sections (1) to (4) of Section 36A, it would then be only a question of inference to be drawn by the Commission as to whether such trade practice causes loss or injury to the consumers of goods or services either by eliminating or restricting competition or otherwise. The words "or otherwise" are of wider import and they signify not only actual loss or injury suffered by consumers but also probable or likelihood of the consumers suffering loss or injury in any form. The object of the amending Act 30 of 1984 is to extend an additional protection to the consumers from being subjected to unfair trade practice and, therefore, it is not necessary to prove any loss or injury actually suffered by the consumers. Consistent with this object, Section 36D empowers the Commission to issue a cease and desist order and can prevent execution of trade practice which may fall in one or more of the practices mentioned in sub Sections (1) to (5) of Section 36A.

13. On careful analysis of unfair trade practice defined in Section 36A, it is quite clear that the trade practice which is undertaken by the company for the purpose of promoting the sale, use or supply of any goods or for the provision of any service/services adopts one or more following practices and thereby causes loss or adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or service whether by eliminating or restricting competition or otherwise would amount to unfair trade practice. The above key words used in Section 36A while defining the unfair trade practices have laid emphasis on "thereby causes loss or injury to the consumers of such goods or services whether by eliminating or restricting competition or otherwise." It must, therefore, follow that any such unfair trade practice which causes loss or injury to the consumers of such goods or service either by eliminating or restricting competition or otherwise would attract the penal consequences as provided under this chapter. Each of the clauses employed in Section 36A is interwoven by use of the conjunction and would indicate that before determining a trade practice being unfair trade practice, the Commission has to be satisfied as to whether the necessary ingredients contained therein are satisfied or not. The words "or otherwise" in Section 36A assuming are of wider import and would signify not only actual loss or injury suffered by consumers but also would include probable or likelihood of consumers suffering loss or injury in any form. But for that purpose also, there was to be some cogent material before the Commission to support a finding of unfair trade practice and any inferential finding would be contrary to Section 36A of the Act. It is necessary for the Commission to call upon the parties to substantiate the allegations. The burden of proof, the nature of proof and adequate thereof would depend upon the facts and circumstances of each case.

14. The Commission in its impugned order held that the gift/prize scheme floated by the company amounted to unfair trade practices under Section 36A(3) (a) of the Act and to support this finding,

the only material placed before the Commission was the complaint filed by the D.G. containing an averment that the company had raised the prices of its detergent a few days before the impugned scheme was floated. The finding of the Commission in this behalf precedes on the footing that the prize money under the impugned scheme was either fully or partly covered by the amount charged in the transaction as a whole. Should this averment in the complaint of the D.G. be presumed to be peruse valid being a proof of an unfair trade practice under Section 36A(3)(a) of the Act? The Commission appears to have been influenced by its own unreported decisions wherein such a view was taken and followed. Mr. Dushyant, Learned Senior Advocate for the appellant urged that the Commission had not taken into account the reply filed on behalf of the company that the prices of the detergent powder were required to be raised because of raise in the prices of the raw materials. If the Commission were to call upon the company to justify the increase in the prices of the detergent powder dehors the prize money-the Company would have produced the material to dislodge the assumption that this increase in the princes of the detergent powder was not bonafide and in fact an exercise to cover fully or partly the prize money. The learned counsel for the appellant stated before us that the audited balance sheets and other evidence is in their possession which would indicate that the increase in the prices of the detergent powder was necessitated because of increase in the prices of raw materials and other connected factors therewith. For want of sufficient opportunity and under the misconception of law, the company could not produce the evidence on record and, therefore, prayed that the matter be remitted back to the Commission with liberty to the company to produce the relevant evidence on record to substantiate its contentions. Having regard to the facts and circumstances of the case and having come to the conclusion that the inference of peruse presumption against the company under Section 36A(3)(a) of the Act was unsustainable. Along with this appeal, the company had produced on record certain documents to justify the increase in the prices of the detergent powder and also sought to prove that the increase in the prices of the detergent powder has no nexus with the prize money covered by the impugned scheme either fully or partly. However, without expressing any opinion in this behalf and to do the justice between the parties, we are of the opinion that the company needs to be given an opportunity to prove its case that they have not committed any unfair trade practice under Section 36A (3) (a) of the Act. Such a finding is necessary in order to determine whether such an unfair trade practice had caused loss or injury to the consumers of such goods by eliminating or restricting competition or otherwise . As stated earlier, except the complaint of the D.G., there was no other material before the Commission which would justify the finding in this behalf. Such an exercise is necessary since any order passed under Section 36D attracts the penal consequences.

15. For the aforesaid conclusions, we are of the opinion that the impugned order of the Commission passed under Section 36D of the Act holding that the company had committed unfair trade practice under Section 36A (3)(a) of the Act is unsustainable and it is accordingly quashed and set aside. The matter is remitted back to the Commission for afresh disposal in accordance with law after giving an opportunity to both the parties to lead such evidence as they deem fit. The appeal is accordingly disposed of. In the circumstances of the present case, parties are directed to bear their own costs.